A New System of Accountability

Zafarullah Khan

A Persian proverb says that if a mason tilts the first brick, the building will be raised tilted till the stars. This is true about the National Accountability Bureau. Mir Shakil-ul-Rehma is incarcerated in a flimsy 34 years old bilateral civil matter and Shahid Khaqan Abbasi was arrested in July 2019 but still no reference has been filed against him. A usurper promulgated The National Accountability Bureau Ordinance 1999 (NAB law) to witch-hunt democratic forces. The NAB law itself and its practice has greatly damaged our political system, business and the civil service, leading to an irreparable loss to the state and society at large.

The honourable Supreme Court in a recent judgement has summed up this reality: "*Rather than doing any good to the country or our body politic and cleansing the fountain heads of governance, these laws and the manner in which they were enforced, caused further degeneration and created chaos, since the same were framed and applied with an oblique motive of arm twisting and pressurizing political opponents into submission, subjugation and compliance, or remove them from the electoral scene at least temporarily…'.'*

This unfathomable quagmire is due to the unjust law and its misuse. Hence, it is high time to substitute the NAB law with a new law, *inter alia*, for the following reasons:

1. That NAB law was promulgated under Martial Law and it is there as a *fait accompli*. The successive governments could not change or amend it as they did not have either the will or the majority in both Houses and they wanted to change this sensitive law by consensus to avoid any blame. Hence, a new accountability law shall be enacted after a thorough debate in the public, media and the Parliament.

2. The definitions in the NAB law like the ‘accused’ ‘associate’, ‘holder of public office’, ‘wrongful default’ are vague and wide. The definition of ‘corruption and corrupt practices’ also is too elusive. The definitions needs to be properly defined in the new law in the light of the constitutional guarantees, international best practices and the case law as laid down by our superior courts.
3. The Chairman NAB solely can order arrest, freeze property, transfer cases from one court to another, accept plea bargain and voluntary return, tender pardon and make approvers. In other words, the Chairman has more powers than Viceroy Lord Mountbatten. All such powers vested in a single person is against the dictum by Lord Action: *Power tends to corrupt, and absolute power corrupts absolutely*. All these powers of the Chairman shall be vested in a Commission consisting of many (four) members drawn from various specialties (law, accounts, investigation and administration).
4. The Chairman NAB can appoint employees and consultants without the Federal Public Service Commission of Pakistan (FPSC), a constitutional body to select civil servants. These powers are not available even to the President of Pakistan. All the new appointments and promotions in the new institution shall be made by the FPSC and all existing appointments shall be scrutinized by the FPSC within three months of the new law.
5. The NAB law shifts the burden of proof from NAB to the accused persons against the well-established legal maxims about ‘presumption of innocence’ practiced in all the civilized world. The burden is sometimes shifted in white-collar crimes but the NAB law is badly worded and is being misused. In the new law, principles of ‘presumption of innocence’ and ‘onus of proof’ shall be reflected in the interest of justice.

6. The disqualification of an accused from holding a public office starts from its first conviction. It happens that NAB court convicts a person, he is disqualified and de-seated and after a few years, he is declared innocent in an appeal. This disqualification for this intervening period is unfair, unjust and against the natural justice. Therefore, the disqualification shall start from final adjudication of the matter by the final court.
7. The Code of Criminal Procedure, 1898, (Code) is the main procedural law applicable in all criminal cases including cases of murder and terrorism but the NAB court may dispense with any provision of the Code and follow such procedure as it may deem fit. This power is not even available to a High Court. This power shall be taken away from the NAB court and the Code shall apply in the NAB proceedings.
8. When the Chairman NAB has initiated an inquiry or investigation, the accused person or any relative or associate, cannot transfer or create a charge on any property owned by him, while the inquiry, investigation or proceedings are pending before the NAB or the Court; and any transfer or creation of a charge shall be void and any violation shall be punishable. This draconian provision ruins the whole business of the accused. This provision shall be limited to the property related to the alleged crime only and shall be dependent on the order of the court with an appeal to a High Court.
9. Under normal criminal laws, an accused can be sent on physical remand only up to 14 days whereas under NAB law, an accused person can be detained for a period of ninety days. All of the cases of the NAB are based on documentary evidence; therefore, there is no need to detain a person for so long; hence, physical remand shall be reduced to 14 days.

10. Where a holder of public office or any other person voluntarily comes forward and offers to return the assets or gains made by him (plea bargain and voluntary return), the Chairman NAB may accept such offer, and discharge such person from all his liability. In practice, this is done under duress and coercion and, therefore, these powers shall be either taken away or shall be properly defined and linked with the court.
11. The Chairman NAB may, at any stage of inquiry, investigation or trial, with a view to obtaining the evidence of any person, tender a full or conditional pardon to such a person who shall not be tried for the offence. The Chairman NAB may also withdraw this pardon. This power is usually misused and civil servants are coerced to become approvers against politicians. Interestingly, such approvers though admit their guilt but are allowed to continue their services without even efficiency and disciple proceedings. The pardon procedure shall be as it is stipulated under the Code.
12. The employees of the NAB may be paid by the Chairman NAB bonuses or *ex-gratia* payments for rendering commendable services in detection, investigation and prosecution of any offence. How an investigation agency can get such rewards and why then only NAB? This scheme shall be scrapped all together.
13. The NAB have an indemnity from any civil suit, prosecution etc., while exercising any power or performing any function whereas the Police does not enjoy any such indemnity rather Police has penalty of five years under the section 156 of Police Order 2002 if a police officer without reasonable cause, enters or searches; or vexatiously and unnecessarily seizes the property of any person; or vexatiously and unnecessarily detains, searches or arrests any person; or inflicts torture

or violence to any person in his custody. Similar provision shall also be added in a new law to match the accountability with responsibility.

14. All the offences under the NAB law are non-bailable and no Court, including High Court or the Supreme Court, has jurisdiction to grant bail to any person accused of any offence though bail is available in murder or terrorism cases. It is a common practice, that NAB accused persons languish in jails for many years and are then acquitted. The courts shall have the power to grant bail.

The NAB law and its application so far make it abundantly clear that the NAB law is a black law against the time-tested principles of the criminal law, international best practices and inalienable dignity inherent in the mankind. It shall be repealed henceforth with and a new institution shall be established under a better law. *(Writer is a former SAPM/Minister for Law and a Barrister: mail@zafarullahkhan.com) https://www.thenews.com.pk/print/704365-for-a-new-system-of-accountability*